2006

State of Utah v. Susan Tripp : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
PLAINTIFF/APPELLEE,	:	Case No. 20060972-CA
v.	:	
SUSAN TRIPP,	:	(not incarcerated)
DEFENDANT/APPELLANT.	:	

OPENING BRIEF OF APPELLANT

This is an appeal from convictions for automobile homicide, a third degree felony, in violation of Utah Code Ann. § 76-5-207, and failure to yield the right of way, a class C misdemeanor, in violation of Utah Code Ann. § 41-6-72.10(3), entered in the Third District Court in and for Salt Lake County, State of Utah, the Honorable John Paul Kennedy, Judge, presiding.

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JURISDICTION

Utah Code Ann. § 78-2a-3(2)(e) provides this Court's jurisdiction over this appeal from a third degree felony conviction entered in a court of record.

ISSUES, STANDARDS OF REVIEW AND PRESERVATION

1. Did the trial court err in denying the motion to suppress?

Motions to suppress are reviewed for clear error with regard to factual findings, and for correctness with regard to legal conclusions. See, e.g., State v. Jarman, 1999 UT App 269, ¶ 7, 987 P.2d 1284. In challenging a trial court's factual findings on a motion to suppress, Tripp bears the burden to marshal the evidence which supports those findings. See, e.g., In re Estate of Beesley, 883 P.2d 1343, 1347, 1349 (Utah 1994). When Tripp asserts that certain findings are not supported by any evidence, this casts upon the State the

burden to show one scintilla of evidence in support of such findings. See, e.g., Orlob v. Wasatch Medical Management, 2005 UT App 430, ¶ 20, 124 P.3d 269.

The issue was preserved by the motion to suppress (R. 36-58; 65-125; 126-44).

2. Did the trial court err in instructing the jury?

Jury instructions are reviewed for correctness. See, e.g., Child v. Gonda, 972 P.2d 425, 429 (Utah 1998).

This issue was preserved by objections in the trial court (R. 526: 391; R. 527: 683-86).

CONTROLLING CONSTITUTIONAL PROVISIONS AND STATUTES

Controlling constitutional provisions and statutes are in the addendum.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

The State charged Tripp with automobile homicide, a third degree felony, in violation of Utah Code Ann. § 76-5-207(1), and with failure to yield the right of way, a class C misdemeanor, in violation of Utah Code Ann. § 41-6-72.10(3) (R. 2-3). Tripp was initially represented by Barton Warren (R. 8). Magistrate Terry Christiansen presided over the preliminary hearing and ordered Tripp bound over as charged (R. 32-33).

Tripp moved to suppress evidence, the Government opposed the motion, and Tripp replied (R. 36-58; 65-125; 126-44). Judge Kennedy presided over an evidentiary hearing and

heard oral argument before denying the motion to suppress (R. 157-62). Present counsel entered an appearance after the motion to suppress was adjudicated and prior to trial (R. 147).

Following the trial, the jury convicted Tripp as charged (R. 299). Judge Kennedy sentenced Tripp to concurrent terms of zero to five years in prison and ninety days in jail, but then suspended that sentence and required her to serve three hundred and sixty days in jail as a condition of probation (R. 397-400, 403). Tripp filed a timely appeal (R. 409).

STATEMENT OF FACTS

Tripp stopped at the stop sign on the Old Bingham Highway and was driving her truck across U-111 at the intersection, when Daniel Pracht's motorcycle, which was headed south on U-111, slid underneath and into the rear end of her truck (R. 525: 346). Pracht later died from his injuries sustained in the crash (R. 533: 9).

The police were called immediately to the scene, at 6:53 p.m. (R. 526: 449). The police did not ask Tripp to perform field sobriety tests (R. 533: 25). One of the officers who was trained to detect signs of impairment testified at trial that he had no reasonable suspicion that Tripp was impaired, but sought a blood draw from her as a matter of course, as he does in all serious accidents (R. 525: 350, 377).

Tripp consented to undergo a urine test, but adamantly refused to submit to a blood test because she is phobic of needles (R. 533: 65). The police isolated her from her

friends and family, informed her she was in custody, and demanded that she submit to the blood test, telling her that they would get a warrant and take her blood by force if she did not submit (R. 532: 23-27, R. 533: 28, 35, 71-72). The victim's advocate tried unsuccessfully to calm Tripp and assuage her fear of needles, and the blood tech also told to calm her and paraphrased the DUI admonitions, mentioning her rights to silence, to counsel, and her right to refuse the test (R. 525: 268, R. 533: 102). During the blood draw, Tripp was in a police car, with a police officer outside the car door and covering Tripp's eyes, a victim's advocate kneeling in front of her holding one of her hands, and the blood tech right outside the car door holding her other arm behind her (R. 533: 67, R. 525: 270). While she did extend her arm to the blood tech prior to the test, this was in response to his telling her that he was going to put the tourniquet on and see if there was a spot where it would be easy to draw blood (R. 533: 95). The blood tech felt at that time that Tripp did not know that he had his other equipment ready to draw her blood when she extended her arm (R. 533: 95). He testified that once he found a spot to draw the blood, he told her he had found an easy site and told her "we can just go ahead and take care of this," and as the victim advocate continued reassuring Tripp, he stuck the needle in (R. 533: 95). During the blood draw, Tripp was described as terrified, petrified, crying, and panicked (R. 533: 67, 71, 95). She was pulling away and crying as they secured her (R. 533: 67, R. 525: 271).

Tripp's blood, which was drawn at 9:25 (R. 525: 257), showed metabolite of

cocaine and blood alcohol levels of .085 and .089 (R. 525: 305, 309, 319). There was no scientific means to assess when Tripp took the cocaine or whether the cocaine metabolite had any impairing effect on Tripp (R. 525: 306, 309). The equipment used to assess blood alcohol levels is only within six percent of accuracy ninety-six percent of the time (R. 525: 324).

At the time of the collision, Pracht may have been speeding, and this may have been the cause of the accident. As the trial court recognized, the State's evidence conflicted regarding whether he should have been driving fifty or sixty miles an hour (T. 526: 563, 696, R; 527: 705, State's Exhibit 30). Tripp had the right to assume that Pracht was going the speed limit (R. 533: 60-61). The State's accident reconstructionist conceded that, due to a lack of underlying data from the police investigation, he would not purchase stock if his decision were based on information of the same quality as he had to work with in Tripp's case (R. 526: 516). Nonetheless, he estimated that Pracht was driving at least 59 miles an hour, and may have been going faster than that (R. 526: 505, 514). He testified that if Pracht had been going fifty miles an hour, Tripp would have cleared the intersection before Pracht came through, and that there would have been no accident (R. 526: 516).

Pracht's braking error may have caused the accident. The point of impact between his motorcycle and the rear end of Tripp's truck appeared to be within three feet of either side of the center line on U-111, the road Pracht was driving on at the time of the crash

(R. 526: 509). The physical evidence showed that prior to the collision, Pracht was applying only his rear brake (R. 526: 475), and that he skidded for some forty-four feet prior to sliding underneath and hitting Tripp's truck (R. 525: 355-56, 358, R. 526: 465). Applying only the rear brake on a motorcycle routinely causes them to lose control and slide (R. 526: 410, 415). Had Pracht been braking properly, he could have stopped or steered around Tripp's truck, rather than sliding underneath and colliding with it as he did (R. 532: 37-39).

Pracht's motorcycle headlight was on at the time of the crash (R. 525: 348, 374), but the road Pracht was driving on is hilly, and dips three eights of a mile prior to the intersection (R. 533: 59-60). The road configuration or Tripp's own doorpost could have blocked her view of Pracht's motorcycle as she entered the intersection (R. 533: 60).

Pracht's only fatal injury was to his head (R. 525: 238-49). While his helmet was found somewhere near the scene of the crash (R. 525: 344), there was no evidence that Pracht was wearing it at the time of the crash (R. 526: 446-51).

In response to the defense motion to suppress the blood test, the trial court admitted the test result on the theory that Tripp's blood draw was voluntary and consensual (R. 157-60).

The trial court instructed the jury that Pracht's negligence could not be considered as a superseding cause (R. 336).

SUMMARY OF ARGUMENTS

The trial court's ruling denying the motion to suppress on the theory that Tripp consented to the blood draw is factually clearly erroneous and legally incorrect. Tripp's blood test was not taken with her voluntary consent, but was instead taken when she was illegally arrested and physically restrained, and after the police had threatened to obtain a warrant and take her blood by force. These facts fail to establish consent as a matter of law, and compel suppression.

The trial court's jury instructions erroneously forbade the jurors to consider whether Pracht's own conduct was the superseding cause of the fatal accident. This error diminished the State's burden of proof of the element of causation and undercut Tripp's presumption of innocence and constitutional rights to present her defense.

Because of the prejudicial nature of the errors, the Court should reverse Tripp's convictions.

ARGUMENTS

I. THE TRIAL COURT'S RULING ON THE MOTION TO SUPPRESS WAS CLEARLY ERRONEOUS AND LEGALLY INCORRECT.

A. THE FINDINGS OF FACT WERE CLEARLY ERRONEOUS AND MATERIALLY INCOMPLETE.

The trial court's findings on the motion to suppress now follow, with emphasis added to those findings that are challenged on appeal. The challenges follow the

quotation of the court's findings.

FINDINGS OF FACT

1. The defendant was involved in an auto-motorcycle accident, which resulted in the death of Daniel Pracht.
2. The defendant was asked to submit to a chemical test and stated that officers could test her blood if they did not use a needle.
3. The defendant's initial refusal to take a blood test was based solely on her fear of needles.
4. When speaking with Officer Saunders, the defendant denied using alcohol or drugs and expressed her fear of needles.
5. Detective Roberts talked with the defendant multiple times. The more he spoke with the victim, the more concerned he became that she was impaired by something.
6. Detective Roberts based his assessment on the fact that the redness of the defendant's eyes did not dissipate with time, she was nervous, she appeared to lack concern for the victim, and she was smoking heavily.
7. No officer detected the odor of alcohol on the defendant, nor did they observe any obvious signs of impairment, such as poor balance or slurred speech.
8. The victim advocate, Cecilia Budd, detected an odor of alcohol on the defendant while the defendant was seated in a family car.
9. The defendant was eventually placed in Detective Roberts un-marked vehicle and secluded from her family and friends because they were interfering with the investigation.
10. At the time of the blood draw, the defendant was seated in Detective Roberts' unmarked vehicle. The defendant was seated halfway in the vehicle, with the door open and her legs outside the vehicle.
11. At the time of the blood draw, the defendant was not handcuffed or shackled.
12. At the time of the blood draw, Mr. Davis and Cecilia Budd were present, and neither was in uniform or armed. Officer Monson was also nearby, but he was not in uniform.
13. Mr. Davis, the blood technician, spoke to the defendant about a blood draw and Mr. Davis could detect an odor of alcohol from the defendant.
14. Mr. Davis reviewed with the defendant her right to remain silent, her right to counsel, and her right to refuse the test.
15. When asked by Mr. Davis if she would consent to the blood draw, the defendant voluntarily extended her arm.
16. When Mr. Davis drew the defendant's blood, she never tried to

withdraw her arm and she never said "no" or "stop."
17. When the blood draw was over, the defendant was immediately calm and stated that the experience was not as bad as she thought it would be.

(R. 157-159)(emphasis added).

The trial court's findings are incomplete in failing to acknowledge from the outset that Officer Saunders, who initially ordered Detective Roberts to obtain Tripp's blood, routinely took blood samples in cases involving serious accidents and believed that this was a lawful demand for him to make (R. 533: 10, 25, 55), and that at the time of the blood draw, Detective Roberts believed that he had the legal right to demand a blood sample from Tripp as a result of the implied consent statute (R. 532: 23, 533: 33-34).

The police officers' mis-perception that they were not required to obtain Tripp's consent or a warrant, and the fact that the officers made no effort to obtain a warrant, are clearly relevant to the assessment of the legality of the blood draw. See State v. Rodriguez, 2007 UT 15, ¶¶ 53-54, 156 P.3d 711 (recognizing relevance of, and expressing dismay concerning, officer's failure to know that a warrant should be obtained prior to a blood draw).

Tripp does not contest the factual accuracy of the trial court's sixth factual finding, that "Detective Roberts based his assessment on the fact that the redness of the defendant's eyes did not dissipate with time, she was nervous, she appeared to lack concern for the victim, and she was smoking heavily." He testified that her appearance when he approached her was "unusual" because her eyes were red, because she was

shaking, and because she seemed nervous (R. 533: 11). He later testified that the more he talked with Tripp, the more he became concerned that she was impaired because she appeared to lack concern for Daniel Pracht, because the redness in her eyes was not dissipating, and because she was constantly smoking (R. 533: 14).

However, the finding is incomplete because it does not account for Detective Roberts' acknowledgment that shakiness and nervousness would be normal for someone involved in a fatal car accident (R. 533: 27), the testimony of the State's own witnesses that Tripp was very upset by the accident and continued crying up to and throughout the blood draw (R. 532: 44, 48, R. 533: 67, 77, 82) and that her red eyes were caused by her crying (R. 533: 70, 77), and the testimony of the victim's advocate that Tripp was smoking that night in an effort to calm herself (R. 533: 77).

Finding 8 is clearly erroneous in indicating that the victim advocate detected an odor of alcohol on Tripp when Tripp was in a family car, and there is no evidence to marshal in support of it. The victim advocate testified that she thought the odor of alcohol in the family car came from Tripp, but did not know Tripp smelled of alcohol until Tripp was under arrest and in Detective Roberts' police car, and then did not know if the smell came from Tripp's clothing or her mouth (R. 525: 221, 224, R. 533: 76, 78, 86-87).

Finding 9 is correct in noting that Tripps' family and friends were interfering with the police investigation, because police testimony reflects that they were telling Tripp she

did not have to submit to a blood draw, and were walking through the accident site (R. 533: 73-74). However, the finding is incomplete in failing to recognize that Tripp was not just moved to the police car, but was told she was in custody, not free to leave and was arrested at that juncture after she adamantly refused to submit to the blood test (R. 532: 27; R. 533: 16, 31-32, 73). These facts are key to the issue of the lawfulness of her arrest and the subsequent blood draw, particularly in light of the testimony of Officer that there was no reasonable suspicion that Tripp was impaired, and the testimony of Officer Monson that he did not know of a basis for Tripp's arrest (R. 525: 350, 377; R. 533: 73).

Findings 11 and 12 are accurate in indicating that Tripp was not handcuffed or shackled, that the blood tech and the victim advocate were present, that Officer Monson was nearby, and that none of these people was in uniform (e.g. R. 533: 67, R. 525: 270). However, the findings are incomplete in failing to recognize that these people were physically restraining Tripp during the blood draw. During the blood draw, Officer Monson was outside the car door and covering Tripp's eyes, while the victim's advocate was kneeling in front of her holding one of her hands, and the blood tech was right outside the car door holding her other arm behind her (R. 533: 67, R. 525: 270). She was pulling away and crying as they secured her (R. 533: 67, R. 525: 271).

Finding 14 is accurate in reflecting that the blood tech reviewed with Tripp her right to remain silent, her right to counsel, and her right to review the test, because he did testify that he went over the DUI admonition discussing these rights (R. 533: 102).

However, the finding is incomplete in failing to recognize that this discussion occurred after the police informed Tripp that she was in custody, not free to leave, and under arrest (R. 532: 27; R. 533: 16, 31-32, 73). The finding is incomplete in failing to account for police testimony that prior to the blood tech's discussion of the DUI admonition, the police demanded that she take the test and told her that she could not refuse to submit to the blood draw, and that the police would get a warrant and take her blood by force if she did not comply (R. 532: 23-27, R. 533: 28, 35, 71-72).

Finding 15 is clearly erroneous in reflecting that Tripp extended her arm to the blood tech in response to his asking if she would consent to the blood draw, and there is no evidence to marshal in support of this finding. When asked if Tripp consented to the blood draw, the blood tech testified that Tripp extended her arm to him prior to the test in response to his telling her that he was going to put the tourniquet on and see if there was a spot where it would be easy to draw blood (R. 533: 94-95). The blood tech felt at that time that Tripp did not know that he had his other equipment ready to draw her blood when she extended her arm (R. 533: 95). He testified that once he found a spot to draw the blood, he told her he had found an easy site and told her "we can just go ahead and take care of this," and as the victim advocate continued reassuring Tripp, he stuck the needle in (R. 533: 95).

Finding 16 indicates that during the blood draw, Tripp never tried to withdraw her arm and never said "no" or "stop." The finding is supported by the evidence from the

blood tech that she did not ask him to stop during the draw (R. 533: 95). However, it is incomplete in failing to account for the State's witnesses' testimony that during the blood draw, Tripp was terrified, petrified, crying, panicked and pulling away as they secured her (R. 533: 67, 71, 95). The finding is incomplete in failing to account for the blood tech's testimony that he could not remember if she said to stop during the blood draw, but that she was definitely panicked and upset about it (R. 533: 67, 95).

B. THE TRIAL COURT'S LEGAL CONCLUSIONS WERE INCORRECT AND MATERIALLY INCOMPLETE.

The trial court made the following three conclusions of law:

> 1. The defendant's initial refusal was based solely on her fear of needles, and the evidence demonstrates that at the time of the blood draw the defendant's fear was resolved.
> 2. The defendant voluntarily consented to a blood draw.
> 3. The evidence obtained as a result of the blood draw is admissible.

(R. 157-160).

To the extent that the conclusions encompass factual findings, they are clearly erroneous, because there is no evidence that Tripp's fear of needles was resolved at the time of the blood draw, or that she voluntarily consented to the blood draw. Rather, the evidence demonstrates that during the blood draw, Tripp was terrified, petrified, crying, panicked and pulling away as the blood tech, victim's advocate and police officer secured her (R. 533: 67, 71, 95). There is no evidence that Tripp ever gave consent to the draw. Rather, the evidence demonstrates that the blood draw followed the police officers'

telling Tripp that she was in custody, not free to leave, and under arrest (R. 532: 27; R. 533: 16, 31-32, 73), demanding that she take the test, and instructing her that she could not refuse to submit to the blood draw, and that the police would get a warrant and take her blood by force if she did not comply (R. 532: 23-27, R. 533: 28, 35, 71-72).

As the following discussion of law demonstrates, a person's submission to Government threats and physical force does not amount to consent as a matter of law, particularly when any purported consent follows an illegal arrest.

1. TRIPP'S ARREST AND THE WARRANTLESS SEARCH WERE ILLEGAL AND REQUIRE SUPPRESSION OF THE BLOOD TEST RESULTS.

The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"The Fourth and Fourteenth Amendments protect the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.'" United States v. Stone, 866 F.2d 359, 362 (10th Cir. 1989).

Article I § 14 of the Utah Constitution provides protection which is at least co-extensive with that of the federal counterpart, in forbidding "sweeping, dragnet-type detentions of ordinary people engaged in peaceful, ordinary activities. Under both

constitutions, the general rule is that "specific and articulable facts ··· taken together with rational inferences from those facts, [must] reasonably warrant the particular intrusion." State v. DeBooy, 996 P.2d 546, 549 (Utah 2000). See also id. 996 P.2d at 552 (recognizing that Article I § 14 and numerous provisions of the Utah Declaration of Rights, consistent with the history of the founders of this State, are concerned with "all purpose criminal investigation without individualized suspicion.").

In order to justify a warrantless arrest, the Government must establish probable cause. See, e.g., State v. Hansen, 2002 UT 125, ¶¶ 34-36, 63 P.3d 650 (police must have probable cause to arrest); United States v. Valenzuela, 365 F.3d 892, 901 (10th Cir. 2004)(Government must prove probable cause to justify arrest). Probable cause is established if the facts known to the officer and the fair inferences from those facts would lead a reasonable and prudent person to believe that the suspect had committed a crime. State v Cole, 674 P.2d 119, 125 (Utah 1983).

Similarly, in order to justify the warrantless search involved in the blood draw, the Government must establish, *inter alia,* a clear indication that evidence would be found in the blood draw. See, e.g., State v. Alvarez, 2005 UT App 145, ¶ 16, 111 P.3d 808 (to justify a warrantless blood draw or other Government search, the Government must prove by at least a preponderance of the evidence "'(A) "a clear indication that evidence would be found"; (B) "exigent circumstances that justified the warrantless bodily intrusion"; and (C) "that the method chosen was a reasonable one, performed in a reasonable manner.'")

(citation omitted).

In the instant matter, the police had no probable cause, but instead arrested Tripp after she adamantly refused to submit to a blood draw (R. 533: 16, 31-32). They did this while acting under the incorrect belief that blood draws are routinely taken in serious accidents (R. 533: 10, 25), and that the police had the legal right to demand a blood sample from Tripp as a result of the implied consent statute (R. 532: 23, 533: 33-34).

Officer Saunders conceded that he had no reasonable suspicion that Tripp was impaired or intoxicated, and testified that he sought a blood draw because the accident was serious, and he routinely seeks blood draws in such cases and believed he could make the demand (R. 525: 350, 377). Tripp exhibited no signs of intoxication or impairment (e.g. R. 525: 387). See Trial Court's finding 7 ("No officer detected the odor of alcohol on the defendant, nor did they observe any obvious signs of impairment, such as poor balance or slurred speech."). Her red eyes, crying, smoking and nervousness were all consistent with the facts that she had just been involved in a fatal traffic accident and had been informed by the police that she had just killed a man and could not refuse their demand that she submit to a blood draw, which they would force if necessary, despite her profound fear of needles (e.g. R. 533: 11, 27, 121, 133). Her prolonged crying refutes the notion that she did not feel bad about the accident (e.g. R. 532: 14, R. 525: 225, 229). The fact that she was willing to submit to urinalysis further counsels against accepting the notion that her refusal to submit to the blood test indicated intoxication (R. 532: 14).

At the time of the arrest and blood draw, the police did not know if Pracht had been speeding when he ran into the back of Tripp's truck – Detective Roberts conceded that Pracht may have been going ninety miles an hour (R. 525: 373, R. 532: 32-35). From Pracht's skid marks, it appeared that he had braked improperly, in a manner known to cause the sliding which preceded his collision with Tripp's truck (R. 532: 17, 37). It appeared from the evidence at the scene that had he not done this, there was ample room for him to steer around Tripp's truck in the intersection or to stop before colliding with the truck (R. 532: 37, 58-59).

The foregoing facts of this case did not establish probable cause to justify Tripp's arrest, and failed to establish a clear indication that evidence would be found to justify the blood draw. Compare State v. Rodriguez, 2007 UT 15, ¶¶ 3, 57, 59, 156 P.3d 711 (police had probable cause to justify a warrantless blood draw, where driver made an abrupt left turn in front of an oncoming school bus, accident was likely to be fatal, defendant had bloodshot eyes and slurred speech, and vodka bottle was found at the scene of the accident). See also People v. Roybal, 655 P.2d 410 (Colo. 1982) (odor of alcohol emanating from defendant and collision did not give rise to probable cause, absent evidence that defendant was responsible for collision).

Because there was no probable cause to justify Tripp's arrest, the arrest violated the Fourth Amendment and Article I §14, and suppression of all evidence flowing from the arrest is required. See Wong Sun v. United States, 371 U.S. 471, 484-488 (1963)

(Fourth Amendment violations require suppression). Suppression is also a necessary consequence of the violation of Article I § 14. See State v. Larocco, 794 P.2d 460, 465-71 (Utah 1990)(*plurality*).[1] Because there was no justification for the blood draw, see, e.g., Alvarez, *supra*, the blood test results are independently subject to suppression under Wong Sun and Larocco, *supra*.

2. THE WARRANTLESS BLOOD DRAW CANNOT BE JUSTIFIED ON THE THEORY OF CONSENT.

The blood draw constituted a search under federal and therefore state constitutional law. See, e.g., Schmerber v. California, 384 U.S. 757, 767-68 (1966), Larocco, *supra*. Because there was no warrant, the Government bears the burden to justify the search. See, e.g, State v. Morck, 821 P.2d 1190, 1993 (Utah App. 1991) (Government bears burden to justify warrantless search). In order to justify the warrantless search of Tripp on the theory of consent, the Government must show that the purported consent was voluntary, and was not the product of the unlawful arrest. E.g., State v. Thurman, 846 P.2d 1256, 1262 (Utah 1993).

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[1]While Larocco is a plurality opinion, it is routinely applied as governing law in this state. See State v. Thompson, 810 P.2d 415, 416-20 (Utah 1991) (majority of the Court recognized privacy interest in bank records under Article I § 14, held in accordance with Larocco that exclusion is a necessary consequence of a violation of Article I § 14, and that no exceptions had been recognized to the Utah exclusionary rule); State v. DeBooy, 996 P.2d 546, 554 (Utah 2000) (finding exclusion of illegal checkpoint stop to be a necessary consequence of Article I § 14); State v. Ziegelman, 905 P.2d 883, 887 (Utah App. 1995) (finding that violation of Fourth Amendment during traffic stop required suppression under Larocco).

Utah law consistently recognizes that where purported consent follows an illegality, the Government's burden is substantial. Two factors determine whether consent to a search is lawfully obtained following police action that violates the Fourth Amendment, such as the unlawful arrest here: (1) the consent must be voluntary in fact; and (2) the consent must not be obtained by police exploitation of the prior illegality. E.g., Thurman, *supra*. Both tests must be met in order for evidence obtained in searches following police illegality to be admissible. Id.

> Whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the Government need not establish such knowledge as the sine qua non of an effective consent. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, a court must take into account both the details of police conduct and the characteristics of the accused, which include "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." It is the State's burden to prove that a consent to search was voluntary.

State v. Robinson and Towers, 797 P.2d 431, 437 and n.7 (Utah App. 1990).

> Factors which may show a lack of duress or coercion include:
>
> 1) the absence of a claim of authority to search by the officers; 2) the absence of an exhibition of force by the officers; 3) a mere request to search; 4) cooperation by the owner of the vehicle; and 5) the absence of deception or trick on the part of the officer.

State v. Whittenback, 621 P.2d 103, 106 (Utah 1980). If multiple police are present when consent is given, this can constitute a show of force. See id.

When a person submits or acquiesces to police authority, this demonstrates

coercion, rather than consent. See Florida v. Royer, 460 U.S. 491, 497 (1983)(plurality)("[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority."); Bumper v. North Carolina, 391 U.S. 543 (1968)("Where there is coercion there cannot be consent."); State v. Whittenback, 621 P.2d 103, 106-107 (Utah 1980), *supra.* Cf. State v. Kelly, 718 P.2d 385, 389 (Utah 1986) (contrasting Bumper and stating, "Nor was defendant's consent mere acquiescence to perceived police authority.").

The Government did not establish voluntary consent on the facts of Tripp's case. The police isolated her from her friends and family, informed her she was in custody, and demanded that she submit to the blood test, telling her that they would get a warrant and take her blood by force if she did not submit (R. 532: 23-27, R. 533: 28, 35, 71-72). Dung the blood draw, Tripp was in a police car, with a police officer outside the car door and covering Tripp's eyes, a victim's advocate kneeling in front of her holding one of her hands, and the blood tech right outside the car door holding her other arm behind her (R. 533: 67, R. 525: 270). While she did extend her arm to the blood tech prior to the test, this was in response to his telling her that he was going to put the tourniquet on and see if there was a spot where it would be easy to draw blood (R. 533: 95). The blood tech felt at that time that Tripp did not know that he had his other equipment ready to draw her blood when she extended her arm (R. 533: 95). He testified that once he found a spot to draw

the blood, he told her he had found an easy site and told her "we can just go ahead and take care of this," and as the victim advocate continued reassuring Tripp, he stuck the needle in (R. 533: 95). During the blood draw, Tripp was described as terrified, petrified, crying, and panicked (R. 533: 67, 71, 95). She was pulling away and crying as they secured her (R. 533: 67, R. 525: 271).

These facts do not demonstrate a consensual search. Rather, they demonstrate that the police and their agents forced and tricked Tripp into the blood draw. See, e.g., Bumper and Whittenback, *supra*.

The Government bears a particularly heavy burden in seeking to establish consent following a preceding illegality. See Brown v. Illinois, 422 U.S. 590, 603-04 (1975). In assessing the Government's proof on this issue, the Court should consider "the totality of the circumstances surrounding the defendant's consent, focusing on: the temporal proximity of the illegal detention and the consent, any intervening circumstances, and particularly, the purpose and flagrancy of the officer's unlawful conduct." United States v. Walker, 933 F.2d 812, 818 (10th Cir.), cert. denied, 502 U.S. 1093 (1992). Whether the officer informed the suspect of her right to refuse consent or to leave are significant factors in the equation. United States v. Fernandez, 18 F.3d 874, 882 (10th Cir. 1994). Where only minutes pass between the illegal police activity and the purported consent, and where there are no intervening circumstances, a finding of voluntary consent is generally not appropriate. See id. at 883. See also United States v. McSwain, 29 F.3d

558, 562 (10th Cir. 1994)(Government must prove both that consent was voluntary, and that there was a break in the events between the consent and the preceding illegality; finding that failure to inform defendant of rights to leave and rights to refuse consent point to involuntary consent).

Assuming *arguendo* that the Government could prove that Tripp's consent was voluntary, the consent was temporally proximate to and part of her illegal arrest and continuing detention. The only arguably attenuating factor was the blood tech's reviewing the DUI admonition, and mentioning Tripp's rights to silence, counsel and to refuse the test (R. 533: 102). This discussion, coming from the blood tech, undoubtedly rang rather hollow to Tripp, given that the discussion occurred after the police informed Tripp that she was in custody, not free to leave, and under arrest (R. 532: 27; R. 533: 16, 31-32, 73), and that the discussion followed the police demand that she take the test and telling her that she could not refuse to submit to the blood draw, and that the police would get a warrant and take her blood by force if she did not comply (R. 532: 23-27, R. 533: 28, 35, 71-72). Particularly where the blood was drawn when Tripp was physically surrounded and restrained by the police and their agents, after the blood tech tricked her into surrendering her arm on the pretense that he would only check to see if there were a suitable vein (R. 533: 95), his admonition to her did not attenuate the blood draw from the preceding illegalities, but rather, aggravated them. Tripp was not informed that she was free to leave, but was instead informed that she was in custody, not free to leave and

under arrest, and that the police would take her blood by force and get a warrant if she did not submit (R. 532: 23-27, R. 533: 28, 35, 71-72). The police were not acting in an effort to comply with the Fourth Amendment, but instead, were flagrantly intent on violating it, by taking Tripp's blood without first obtaining a warrant or her voluntary consent (R. 525: 10, 25, R. 532: 23, R. 533: 33-34). These facts demonstrate that any purported consent by Tripp was tainted by and part of the ongoing violations of Tripp's constitutional privacy rights. See, e.g., Brown and Fernandez, *supra*.

Because the warrantless search cannot be justified under the theory of consent, suppression is required by Wong Sun and Larocco, *supra*.

C. THE ERRONEOUS ADMISSION OF THE BLOOD TESTS WAS PREJUDICIAL.

It is normally the Government's burden to prove constitutional errors harmless beyond a reasonable doubt. See, e.g., Chapman v. California, 386 U.S. 18, 23-24 (1967) (Government bears the burden of proving most constitutional errors harmless beyond a reasonable doubt). The Government cannot meet this burden here, and assuming *arguendo* that she must, Tripp can establish prejudice from the admission of the blood test results.

The blood test results were prejudicial because they were essential to the prosecution's conviction of Tripp for automobile homicide, because the automobile homicide statute required proof of her blood alcohol level or proof that she was under the

influence of any alcohol or drug to the degree that she could not drive safely. Utah Code Ann. § 76-5-207 (2)(a) (2003). Given that the witnesses attested that Tripp did not appear to be under the influence (e.g. R. 525: 350, 377), and given that the accident may well have been caused by Pracht's speeding and/or improper braking, rather than by any unsafe driving by Tripp (T. 526: 475, 509, 515, 514, 516, R. 532: 37-39), there is a reasonable probability of a different result had the blood test results not been admitted.

Had the jurors not been prejudiced by learning of Tripp's driving while under the influence of alcohol and with metabolite of cocaine in her system, there is a reasonable likelihood that they would not have convicted her of failing to yield the right of way, because the governing statute, Utah Code Ann. § 41-6-71.10 (2004), requires drivers to stop at stop signs and yield to those cars which constitute an immediate hazard. See id. subsection (b). Given that Tripp was entitled to assume that Pracht was driving the speed limit, and given that Pracht was apparently speeding and thereby caused the accident (T. 526: 505, 514, 516, 563, 696, R; 527: 705, State's Exhibit 30, R. 533: 60-61; R. 526: 505, 514), there is a reasonable likelihood that the jurors would not have held her responsible for failing to appreciate the hazard he posed had they not been informed of the blood test results.

Accordingly, this Court should order a new trial wherein the blood test results are excluded.

II. THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTIONS REQUIRE A NEW TRIAL.

Both the federal and state constitutions guarantee all criminal defendants' rights to present their defenses and have the jury accurately instructed on their theory of the case and the governing law. In the unanimous opinion, Crane v. Kentucky, 476 U.S. 683 (1985), Justice O'Connor explained the fundamentals of federal constitutional law governing the criminal defendant's right to present his defense. She stated,

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, [410 U.S. 284, 302 (1973)], or in the Compulsory Process of confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23 (1967); Davis v. Alaska, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. at 465; cf. Strickland v. Washington, 466 U.S. 668, 684-685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

Id. at 690.

The Constitution of Utah provides parallel protections. An essential of due process provided by article I section 7 of the Utah Constitution is the "fair opportunity to submit evidence." Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945). "[T]he defendant's right to present all competent evidence in his defense is a right guaranteed by the due process clause of our State Constitution, Art. I, Sec. 7[.]" State v. Harding, 635 P.2d 33, 34 (Utah 1981). See also Constitution of Utah, Article I § 12, Utah Code Ann. §

77-1-6 (providing parallel statutory protection).

To safeguard the foregoing rights, Utah law has long recognized that a defendant is entitled to have the jury instructed clearly and comprehensibly on her theory of the case. See, e.g., State v. Smith, 706 P.2d 1052, 1058 (Utah 1985).

In the instant matter, Tripp's primary defense was that she was not the proximate cause of the fatal accident and that she was not negligent, and that Pracht's negligence was the superseding cause of the accident. This defense was well founded in the law, which recognizes that in criminal cases, one cannot be held liable for automobile homicide unless one's negligence caused the death of another. The pertinent 2003 version of Utah Code Ann. § 76-5-207, which defined automobile homicide at the time of the April 2004 accident, provided:

> ....
> (2)(a) Criminal homicide is automobile homicide, a third degree felony, if the person operates a motor vehicle in a negligent manner causing the death of another and:
> (i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
> (ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or
> (iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation.
> ....

(Emphasis added).

As the court demonstrated in State v. Lawson, 688 P.2d 479 (Utah 1984), the

defendant's act is not considered the proximate cause of the death if the death is caused by the act of a third party, which third party action was reasonably unforeseeable by the defendant. Id. at 482 and n.4. Lawson was convicted of automobile homicide and DUI with injury and on appeal, he challenged the jury instructions on causation. Id. at 481. The Utah Supreme Court approved of the trial court's instruction on intervening cause:

> If you find that the defendant was negligent but that the proximate cause of the alleged harm was an independent intervening act of a person not a party to this case that the defendant, in the exercise of ordinary care, could not reasonably have anticipated as likely to happen, the defendant's original negligence is superseded by the intervening act and is not the proximate cause of the alleged harm. However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening act it does not supersede his original negligence or break the chain of proximate causation.

Id. at 482 n.4. As causation is explained in LaFave, Criminal Law, (Third Edition, 1972), when criminal results are caused by intervening acts which are coincidental to, rather than a response to, a defendant's actions, the coincidental acts are normally viewed as intervening acts which break the chain of causation from the defendant to the result, unless the coincidental acts are reasonably foreseeable to the defendant. See id. Chapter 3, "Causation," §35, page 258. Similarly, in State v. Larsen, 2000 UT App. 106, 999 P.2d 1252, two of the reasons this Court overturned the negligent homicide conviction was that the trial court failed to address the proximate cause issue, and the Government had failed to establish a causal link between the fatal accident and the defendant's lack of headlights, failure to signal, and use of alcohol. 2000 UT App 106, ¶ 20.

Tripp's lack of causation defense was well founded on the evidence as well, because the evidence demonstrated that at the time of the collision, Pracht may have been speeding, and this may have been the cause of the accident. As the trial court recognized, the State's evidence conflicted regarding whether Pracht should have been driving fifty or sixty miles an hour (T. 526: 563, 696, R; 527: 705, State's Exhibit 30). Tripp had the right to assume that Pracht was going the speed limit (R. 533: 60-61). The State's accident reconstructionist conceded that, due to a lack of underlying data from the police investigation, he would not purchase stock if his decision were based on information of the same quality as he had to work with in Tripp's case (R. 526: 516). Nonetheless, he estimated that Pracht was driving at least 59 miles an hour, and may have been going faster than that (R. 526: 505, 514). He testified that if Pracht had been going fifty miles an hour, Tripp would have cleared the intersection before Pracht came through, and that there would have been no accident (R. 526: 516).

Similarly, Pracht's braking error may have caused the accident. The point of impact between his motorcycle and the rear end of Tripp's truck appeared to be within three feet of either side of the center line on U-111, the road Pracht was driving on at the time of the crash (R. 526: 509). The physical evidence showed that prior to the collision, Pracht was applying only his rear brake (R. 526: 475), and that he skidded for some forty-four feet prior to sliding underneath and hitting Tripp's truck (R. 525: 355-56, 358, R. 526: 465). Applying only the rear brake on a motorcycle routinely causes them to lose

control and slide (R. 526: 410, 415). Had Pracht been braking properly, he could have stopped or steered around Tripp's truck, rather than sliding underneath and colliding with it as he did (R. 532: 37-39).

Pracht's motorcycle headlight was on at the time of the crash (R. 525: 348, 374), but the road Pracht was driving on is hilly, and dips three eights of a mile prior to the intersection (R. 533: 59-60). The road configuration or Tripp's own doorpost could have blocked her view of Pracht's motorcycle as she entered the intersection (R. 533: 60).

Pracht's only fatal injury was to his head (R. 525: 238-49). While his helmet was found somewhere near the scene of the crash (R. 525: 344), there was no evidence that Pracht was wearing it at the time of the crash (R. 526: 446-51).

Given the foregoing facts, Tripp's constitutional rights to present her defense should have required the trial court to give the jurors instructions embodying her defense, and requiring the Government to overcome her presumption of innocence and meet its burden of proof beyond a reasonable doubt with regard to causation.

During an unrecorded bench conference and in-chambers conference, and then later on the record, counsel for Tripp argued that the trial court's instructions defeated Tripp's constitutional rights, by failing to permit the jurors to consider Pracht's negligence in assessing whether Tripp was negligent and was the cause of Pracht's death (R. 526: 391; R. 527: 683-84). The trial court overruled the objections, because the court felt that under the court's instructions, the defense could argue that Pracht's acts and

omissions were superseding causes (R. 527: 686).

The instructions, however, foreclosed such an argument, in specifically instructing the jurors that Pracht's negligence, if any, could not be considered to be a superseding cause, but could only be viewed as a concurrent cause, which would not insulate Tripp from criminal liability (R. 336). The instructions further informed the jury that Tripp would not be relieved of criminal liability on the basis of a contributing cause (R. 335, 340). If the jurors followed these instructions, and the law presumes that they did, e.g., State v. Harmon, 956 P.2d 262, 272 (Utah 1988), the jurors did not consider whether Pracht's actions were the superceding cause of the accident (R. 336, 335, 340). This violated Tripp's constitutional right to present her defense, and in insulating the Government's causation case from scrutiny, undercut the Government's burden of proof and Tripp's presumption of innocence. See, e.g., Smith, *supra* (recognizing the defendant's right to have the jury correctly instructed on the law, including the theory of the defense).

It is normally the Government's burden to prove constitutional errors harmless beyond a reasonable doubt. See, e.g., Chapman v. California, 386 U.S. 18, 23-24 (1967) (Government bears the burden of proving most constitutional errors harmless beyond a reasonable doubt). The Government is not in a position to meet this burden in Tripp's case, because the evidence underlying its essential accident reconstruction analysis was so incomplete that the State's own expert conceded that he would not rely on this quality of

evidence in choosing whether or not to buy stock (T. 526: 516). Given the distinct possibilities that Pracht's speeding and/or improper braking and/or lack of a helmet caused Pracht's death (T. 526: 475, 509, 515, 514, 516, R. 532: 37-39), the Government cannot show that the jury instruction errors which foreclosed the jury's consideration of Pracht's own negligence and the superseding cause were harmless beyond a reasonable doubt. Assuming *arguendo* that Tripp must demonstrate a reasonable probability of a different result, she is able to do so, given the aforementioned evidence that it was Pracht's speeding and/or improper braking or lack of a helmet which caused his death (T. 526: 475, 509, 515, 514, 516, R. 532: 37-39).

Because the jury instructions diminished the Government's burden of proof and under Tripp's presumption of innocence and right to present her defense, and prejudiced the trial, this Court should order a new trial with proper instructions.

CONCLUSION

This Court should order a new trial wherein the blood test results are excluded and the jurors are instructed correctly.

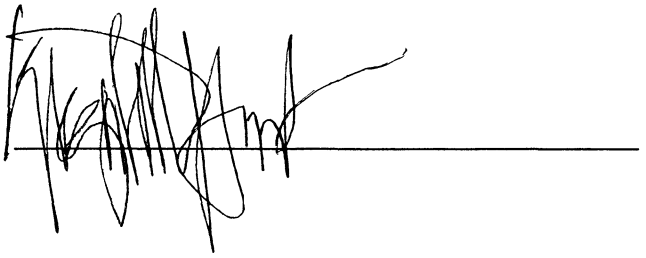
Respectfully submitted this 29th day of May, 2007.

YENGICH, RICH & XAIZ
Attorneys for Appellant

By: _____
RONALD J. YENGICH

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing, first class postage pre-paid, to Assistant Attorney General Fred Voros, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 29th day of May, 2007.



ADDENDUM

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
DENYING THE MOTION TO SUPPRESS

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IN THE THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, WEST VALLEY DEPARTMENT

THE STATE OF UTAH, Plaintiff, -vs- SUSAN TRIPP, Defendant.	FINDINGS OF FACT AND CONCUSIONS OF LAW 0519 03300 Case No. ~~041101951~~ Judge John Paul Kennedy

Defendant's Motion to Suppress Evidence, having come before this Court for hearing in the above entitled manner on February 25, 2005, and Oral Argument on April 18, 2005, in which Defendant was represented by counsel, Barton J. Warren, and the State was represented by co-counsel, Kim Cordova and Sandi Johnson. The Court having reviewed the parties' written briefs and considered oral arguments of counsel, the Court now enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The defendant was involved in an auto-motorcycle accident, which resulted in the death of Daniel Pracht.
2. The defendant was asked to submit to a chemical test and stated that officers could test her blood if they did not use a needle.

3. The defendant's initial refusal to take a blood test was based solely on her fear of needles.
4. When speaking with Officer Saunders, the defendant denied using alcohol or drugs and expressed her fear of needles.
5. Detective Roberts talked with the defendant multiple times. The more he spoke with the victim, the more concerned he became that she was impaired by something.
6. Detective Roberts based his assessment on the fact that the redness of the defendant's eyes did not dissipate with time, she was nervous, she appeared to lack concern for the victim, and she was smoking heavily.
7. No officer detected the odor of alcohol on the defendant, nor did they observe any obvious signs of impairment, such as poor balance or slurred speech.
8. The victim advocate, Cecelia Budd, detected an odor of alcohol on the defendant while the defendant was seated in a family car.
9. The defendant was eventually placed in Detective Roberts un-marked vehicle and secluded from her family and friends because they were interfering with the investigation.
10. At the time of the blood draw, the defendant was seated in Detective Roberts unmarked vehicle. The defendant was seated halfway in the vehicle, with the door open and her legs outside the vehicle.
11. At the time of the blood draw, the defendant was not handcuffed or shackled.

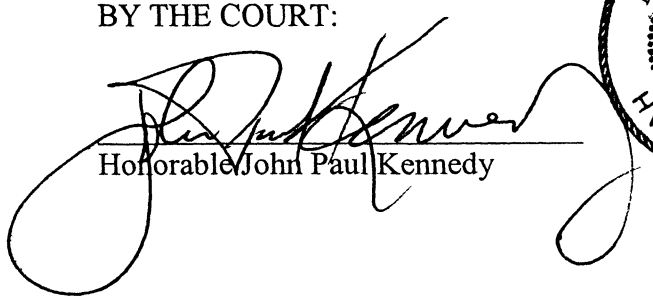
12. At the time of the blood draw, Mr. Davis and Cecelia Budd were present, and neither was in uniform or armed. Officer Monson was also nearby, but he was not in uniform.
13. Mr. Davis, the blood technician, spoke to the defendant about a blood draw and Mr. Davis could detect an odor of alcohol from the defendant.
14. Mr. Davis reviewed with the defendant her right to remain silent, her right to counsel, and her right to refuse the test.
15. When asked by Mr. Davis if she would consent to the blood draw, the defendant voluntarily extended her arm.
16. When Mr. Davis drew the defendant's blood, she never tried to withdraw her arm and she never said "no" or "stop."
17. When the blood draw was over, the defendant was immediately calm and stated that the experience was not as bad as she thought it would be.

CONCLUSIONS OF LAW

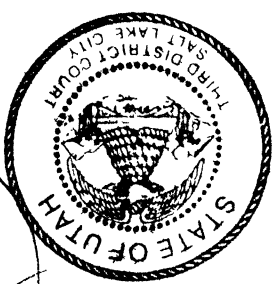
1. The defendant's initial refusal was based solely on her fear of needles, and the evidence demonstrates that at the time of the blood draw the defendant's fear was resolved.
2. The defendant voluntarily consented to a blood draw.
3. The evidence obtained as a result of the blood draw is admissible.

DATED this 26 day of ~~May~~ July, 2005.

BY THE COURT:



Honorable John Paul Kennedy



TRIAL COURT'S RULING ON THE JURY INSTRUCTIONS

argue those things on the causation issue but I also think that they go to negligence themselves.

THE COURT: How do you mean they go to negligence?

MR. YENGICH: I believe they go - the jury has to find as you have defined negligence, that she was negligent in operation of her vehicle and that caused, that caused the death. If indeed there were other forces that actually caused the death, that takes away their requirement of proof beyond a reasonable doubt that she is the negligent factor that set the events into motion.

THE COURT: Well, the way the instructions are written now, as I understand them, they say that if her negligence, her criminal culpability, does not need to be the sole cause, that there may be other factors or other causes involved as long as those other causes do not disrupt the continuous and natural sequence of events, she would be, if she were found to be negligent, she would be guilty under the statute. What you're suggesting is that these other causes that you've described that you would argue, the speed, the helmet, I don't know what other items you have but those items, if the jury believed that those were sufficient to constitute intervening causes or superceding causes that would disrupt the natural sequence of events, then she shouldn't be, even though she may have been negligent to begin with, we have these what I would call intervening

causes. I think the jury instructions use the word superceding causes. I don't think, the way the jury instructions are written now, would rule out an argue that these other charges are superceding causes. I think you can make that argument. The jury will have to determine whether they're superceding, whether they would interfere with the natural sequence of events.

MR. YENGICH: I understand.

THE COURT: So, does the State have any different view?

MS. JOHNSON: No, Your Honor.

THE COURT: Have I expressed what your position is on that?

MS. JOHNSON: Yes Your Honor.

THE COURT: I think that's the way I've seen the instructions and that the way it seems to me that they should be. If there's an additional instruction that the defense would want or some other clarifying instruction, I'd like to see it but I think right now, the way the instructions are written —

MR. YENGICH: Cover that issue.

THE COURT: I think they cover the issue and I think it enables you to make the argument.

MR. YENGICH: Thank you, Your Honor.

THE COURT: Okay, well, if there's anything else,

JURY INSTRUCTIONS

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, v. SUSAN L. TRIPP, Defendant.	**JURY INSTRUCTIONS** Civil No. O51903300 Judge John Paul Kennedy

MEMBERS OF THE JURY:

Attached are Jury Instructions which apply to the above case. Initially, you received the first 16 instructions. This document includes those first 16 instructions plus instructions Number 17 through Number 43.

Dated: 20 July 2006.

By the Court

John Paul Kennedy
Third District Court Judge

JURY INSTRUCTIONS

1. GENERAL INSTRUCTION

There are certain laws and rules which apply to this case. I'll explain them to you from time to time during these proceedings in order to give you the information that you need to fulfill your role as jurors at each stage of the trial. I will give you the first set of instructions at this point. You will receive further instructions before evidence is presented and the final set of instructions after the close of evidence. Please pay careful attention. Each of you has been given a copy of these instructions. This copy is yours to keep. As I read these instructions to you, you may follow along on your copy, or not, as you wish. Keep in mind the following points:

Obey Instructions. Some of these instructions give you information about how the trial will proceed, the rules that govern this process, and the roles of the participants, including your role as jurors. Other instructions tell you what the law is that you are to apply in reaching your verdict in this case. If any attorney makes statements of the law that differ from the instructions on the law that I give to you, you should disregard such statements and rely entirely on these instructions.

Many Instructions. There will be many instructions. All are important. Don't pick out one and ignore the rest. Think about each instruction in the context of all the others.

Gender – Singular/Plural. In these instructions, any references to "she" or "her" also include "he" or "him," or *vice versa*, as appropriate to this case; and the singular, such as "defendant" includes the plural "defendants," when appropriate.

Note Taking. The Bailiff has provided you with notepads and pens. You may take notes during the trial, but don't over do it, and don't let it distract you from following the evidence. The lawyers will review the evidence in their closing arguments and help you focus on what is most relevant to your decision. I also caution that notes are not evidence. Use them only to aid personal memory or concentration. Keep in mind that you must each arrive at a verdict independently, and one juror's memory of the evidence or opinion should not be given excessive consideration solely because that juror has taken notes.

Keep an Open Mind. Don't form or express an opinion about the ultimate issues in this case until you have listened to all the evidence and the lawyers' summaries, along with the final instructions on the law. Keep an open mind until your deliberations are completed.

2. WHAT RULES APPLY TO RECESSES

From time to time I will call for a recess. It may be for a few minutes, a lunch break, overnight or longer. During recesses, do not talk about this case with anyone; not family, friends or even with each other. The bailiff may ask you to wear a badge identifying yourself as a juror so that people will not try to discuss the case with you. Don't mingle with the lawyers, the parties, the witnesses or anyone else connected with the case. You may say "hello" or exchange similar brief civilities with these persons, in passing, but don't engage in any conversation. Don't accept from or give to any of these persons any favors, however slight, such as rides or food. The lawyers and parties are naturally concerned to avoid any hint of improper contact with you, so don't think that they are being purposely rude if they avoid any interaction with you during the course of this trial. If anyone tries to talk to you about the case, let the bailiff know immediately. You may communicate with the bailiff or among yourselves about topics other than a subject of the trial. Don't read about this case in the newspaper or listen to any reports on television or radio, if there are any. Finally, don't form or express an opinion regarding any subject of the trial until you are sent out for deliberation at the end of the trial. These restraints are necessary for a fair trial.

3. THE ROLE OF THE JUDGE, THE JURY AND THE LAWYERS

The judge, the jury and the lawyers are all officers of the Court and play important roles in the trial.

Judge. It is my role as judge to decide all legal issues, supervise the trial and instruct the jury on the LAW that it must apply. The judge may be asked to decide questions of law. Usually these questions concern objections to testimony that one side wants to present. By law, it is the judge's job to decide such questions. A ruling by the judge does not indicate that he is taking sides. The judge is determining that the law does or does not permit that particular question to be asked.

Jury. It is your role as the jury to follow that law and decide the factual issues. Factual issues generally relate to WHO, WHAT, WHEN, WHERE, HOW or similar things concerning which evidence will be presented. An alternate juror has the same responsibilities as any other juror, as he or she may be required to take the place of one of the jurors in the panel in the event an original juror is unable to complete her service. Any alternate juror selected will be identified as such once the case has been presented and the jury is ready to retire to deliberate on a verdict. As a juror, you are the fact finder. You must listen carefully to the evidence presented by each side, and use your life experience and common sense to make a judgment. It is very important to keep an open mind while all the evidence is being presented. Making your mind up before all the evidence is received, could result in a failure to reach a fair and impartial verdict.

Lawyers. It is the role of the lawyers to present evidence, generally by calling and questioning witnesses and presenting

exhibits. It is the responsibility of each of the lawyers to be an advocate, and each has a duty to try to persuade you to accept their version of the facts and to decide the case in favor of the lawyer's client.

Keep in mind that neither the lawyers nor I actually decide the facts of this case, because that is your role. Don't be influenced by what you think our personal opinions are; rather, you decide the case based upon the law explained in these instructions and the evidence presented in court.

4. OUTLINE OF THE TRIAL

The trial will generally proceed as follows:

Opening Statements. The lawyers will outline what the case is all about, and they will indicate what they think the evidence will show.

Presentation of Evidence. The plaintiff will offer its evidence first, followed by the defendant. Each side may also offer rebuttal evidence after hearing the witnesses and seeing the exhibits offered by the other side. If an exhibit is given to you to examine, you should examine it carefully, individually, and without any comment.

Recesses and Breaks. During the trial there will be periods of time when the court recesses. During those times you must not discuss the case with anyone, including fellow jurors; you should not allow anyone to discuss the case with you. If any attempt is made to do so, you should report that to the bailiff immediately. You should not read, hear, or see media coverage of this trial.

Additional instructions on the Law. After each side has presented its evidence, I will give you additional instructions on the law that applies to this case.

Closing Arguments. The lawyers will then summarize and argue the case. They will share with you their respective views of the evidence, how it relates to the law and how they think you should decide the case.

Jury Deliberation. The final step is for you to retire to the jury room and deliberate until you reach a verdict, and you will be

given additional instructions about how you are to do that later. During your deliberations, we will not be able to provide you with transcripts of the trial testimony; you will have to rely on your memory. Thus it is important, whether you take notes or not, that you observe the witnesses carefully and listen carefully to the testimony.

5. THE CHARGES and THE THREE BASIC RULES FOR CRIMINAL CASES

The defendant in this case has been accused of the crimes of automobile homicide and failure to yield the right-of-way. The accusations are in a written document called an INFORMATION, which will be read or summarized for you following this instruction. As you listen, keep in mind that the defendant has entered a plea of "not guilty" and has thereby denied each and all of the essential allegations of the charges contained in the Information.

There are three basic rules about a criminal case that you must keep in mind:

First, the defendant is presumed innocent until proved guilty. The charges against the defendant brought by the State are only accusations, nothing more. They are not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

Second, the burden of proof is on the State throughout the case. The Prosecution bears the burden of proving each and all of the essential allegations of the charges to your satisfaction and beyond a reasonable doubt. The defendant has no burden to prove her innocence, or to present any evidence, or to testify. Since the defendant has the right to remain silent, the law prohibits you from arriving at your verdict by considering that the defendant may not have testified.

Third, as noted, the State must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that in this respect a criminal case is different from a civil case.

The Defendant is charged with the following two crimes:

Count I: On or about April 23, 2004, at 10200 South U-111 Highway, in Salt Lake County, in violation of Utah Code

Section 76-5-207(1), Defendant Susan L. Tripp, was driving a vehicle while (1) having sufficient alcohol in her body that a subsequent chemical test showed that she had a blood alcohol concentration of .08 grams or greater at the time of the test; or (2) was under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that rendered her incapable of safely operating a vehicle, or (3) had a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control; and caused the death of a man named Daniel Pracht, by operating the vehicle in a negligent manner.

And

Count II: On or about April 23, 2004, at 10200 South U-111 Highway, in Salt Lake County, in violation of Utah Code Section 41-6-72.10(2), Defendant Susan L. Tripp did operate a motor vehicle approaching a yield sign and failed to slow down to a speed reasonable for the existing conditions, or, if required for safety, to stop as provided by law or after slowing or stopping, failed to yield the right-of-way to a vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time the operator was moving across or within the intersection or junction of midways.

The Defendant has denied wrong-doing and has entered a plea of "Not Guilty" to both of these alleged offenses.

Defendants' plea of "Not Guilty" puts in issue every material element constituting the above alleged offenses. The plea of "Not Guilty" places upon the Prosecution the burden of proving every element or essential allegation contained in the charges beyond a reasonable doubt.

6. WHAT IS THE JURY'S ROLE IN THIS CASE?

You must decide whether each charge against the defendant has been proved beyond a reasonable doubt. Your decision is called a VERDICT. Your verdict must be based only on the evidence produced here in court. It must be based on facts, not on speculation. Don't guess about any fact. However, you may draw reasonable inferences or arrive at reasonable conclusions from the evidence presented. You should perform your duty to be a jury uninfluenced by pity for the defendant or by passion or prejudice against the defendant. You must not allow yourselves to be biased against the defendant because of the fact that the defendant has been arrested for this offense, or because an Information has been filed, or because the defendant has been brought before the court to stand trial. None of these facts is evidence of guilt, and you are not permitted to infer or to speculate from any or all of them that the defendant is more likely to be guilty than innocent.

You are to be governed in your deliberations solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the State of Utah and the defendant have a right to demand and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, that you will reach a just verdict regardless of what the consequences of such verdict may be. The verdict must represent the individual opinion of each juror.

7. WHAT IS EVIDENCE?

Evidence is anything that tends to prove or disprove the existence of a disputed fact. Evidence includes testimony, documents, objects, photographs, recordings, stipulations, certain qualified opinions, and/or any combination of these things. Sometimes the lawyers may agree that certain facts exist; this is called a stipulation. You should accept any stipulated facts as having been proved. In limited instances, I may take "judicial notice" of a well-known fact. If that happens, I will explain how you should treat it.

8. OPINION TESTIMONY

Under certain circumstances, witnesses are allowed to express an opinion. A person who by education, study or experience has become an expert in any art, science or profession, may give an opinion and the reason for it. A layperson (a non-expert) may also be allowed to express an opinion if it is based on personal observations and it is helpful to understanding such person's testimony or other aspects of the case. You are not bound to believe anyone's opinion. Consider it as you would any other evidence, and give it the weight you think it deserves.

9. WHAT IS NOT TO BE CONSIDERED OR USED AS EVIDENCE?

I've explained to you what evidence is. Now I'll tell you about some things which do not qualify as evidence or which, for some other good reason, you should not consider in reaching your verdict.

Accusation. The fact that formal charges have been filed accusing the defendant of committing a crime is not evidence of guilt. The defendant has entered a plea of not guilty and is presumed to be innocent. As I will discuss in more detail later in these instructions, it is the prosecution's burden to prove to you that the defendant is guilty beyond a reasonable doubt; the defendant does not have the burden to prove that the defendant is innocent.

Punishment. You may be aware of the gravity of the offense charged and the range of potential penalties, but you should not consider what actual punishment the defendant may receive if found guilty. That is for the judge to decide based upon the applicable law.

Right to Remain Silent. If the defendant chooses not to testify in this case, you cannot consider that as evidence of guilt. The Constitution provides that an accused person has the right not to testify and you should not draw any negative inferences based upon a defendant's reliance on this right. If the defendant does choose to testify, defendant's testimony should be given the same consideration you would give to the testimony of any other witness. The fact that a person is accused of a crime is no evidence of that person's guilt and is no reason for rejecting such person's testimony; it should be weighed the same way you weigh the testimony of any other witness.

Lawyer Statements. What the lawyers say is not evidence. Their purpose is to give you a preview of expected evidence and to help you understand the evidence from their viewpoint. If a lawyer makes a statement about the evidence which is different from your own recollection of the evidence, you should rely on your own memory.

Objections to questions. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection, or by the court's ruling on it.

Personal Investigation. Evidence is not what you can find out on your own. You should not make any investigation about the facts in this case. Do not make personal inspections, observations or experiments. Do not view premises unless this is done as a group with the permission of the court, things or articles not produced in court. Don't let anyone else do anything like this for you. Don't look for information in law books, dictionaries or public or private records which are not produced in court.

Out of Court Information. Do not consider anything you may have heard or read about this case in the media or by word of mouth or other out-of-court communication. You must rely solely on the evidence that is produced and received in court.

10. THE JUDGE DECIDES WHAT EVIDENCE IS ADMISSIBLE

Sometimes a question will be raised about whether certain evidence is proper for the jury to consider. This type of question is called an OBJECTION. I rule on objections. If an objection is SUSTAINED the evidence is kept out and you should not consider it, nor should you guess as to what the evidence might have been or what was the reason for the objection. If an objection is OVERRULED the evidence comes in and you may consider it. If evidence which you have heard or seen is STRICKEN you must ignore it.

My decisions regarding the admission of evidence involve issues of law, and I am not giving any opinion as to which witnesses are or are not worthy of belief or as to which party should prevail in the case. Don't be concerned about the reasons for my rulings, and don't try to infer anything about the case from those rulings.

Further, if I do or say anything during the course of this trial that suggests to you that I favor the position of either party, whether in my rulings or otherwise, it is entirely unintentional; and you must not be influenced by that in any way.

11. WHO IS RESPONSIBLE TO CONVINCE THE JURY?

The prosecution has the burden of proof. It is the one making the accusations in this case. The defendant is not required to prove innocence - you must start by assuming innocence. According to our law, the defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt. Before you can give up your presumption that the defendant is innocent, you must be convinced that the defendant's guilt has been proven beyond a reasonable doubt.

12. WHAT IS REASONABLE DOUBT?

"Reasonable doubt" means a doubt that is based on reason and common sense. It is a doubt which is reasonable in view of all the evidence. It must be a reasonable doubt and not a doubt which is merely fanciful or imaginary or based on a wholly speculative possibility. A reasonable doubt is a doubt which reasonable men and women would entertain, and it must arise form the evidence or the lack of the evidence in this case.

Proof beyond a reasonable doubt is that degree of proof which satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it and obviates, or eliminates, all reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty.

13. HOW TO MAKE DECISIONS ABOUT THE EVIDENCE

It will be your duty to determine your verdict relying solely on the evidence presented during the trial. For that purpose you should consider all of the evidence together, fairly, impartially and conscientiously, putting aside any bias, prejudice, or preconceptions.

Once evidence is admitted, you must decide three things about it: Whether it should be believed, how important it is, and what you can reasonably infer or conclude from it. An inference is a conclusion that logic, reason, or common sense leads you to draw from a fact or group of facts that the evidence has established.

Use your common sense as a reasonable person in making these decisions. Review all the evidence. Don't imagine things which have no evidence to back them up. Consider the evidence fairly without any bias or sympathy toward either side.

Where there is conflicting evidence, you should try to reconcile the conflict so far as you reasonably can. Where the conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are.

14. DECIDING WHETHER TO BELIEVE A WITNESS

You are the sole judges of the importance of the evidence, the believability of the witnesses and the facts. There is no firm rule that I can give you for determining whether a witness is truthful. As each witness testifies, you must decide how accurate that testimony is and what weight to give it, using your own good judgment and experience in life. In evaluating testimony, it may help you to ask yourself questions such as these:

Personal Interest. Does the witness have a personal interest in how the trial comes out?

Other Bias. Does the witness have some other bias or motive to testify a certain way?

Demeanor. What impression is made by the witness's appearance and conduct while answering questions?

Consistency. Did the witness make conflicting statements or contradict other evidence?

Knowledge and Memory. Did the witness have a good opportunity to know the facts and the ability to remember them?

Reasonableness. Is the testimony reasonable in light of human experience?

You may also apply any other common sense yardstick to the testimony you hear and the other evidence you receive. You are not required to believe any witness or all that a witness says. You are entitled to believe one witness as against many or many as against one, in accordance with your honest convictions.

The mere fact that a witness is a police officer, in itself, does not make that person's testimony more or less credible, but such testimony must be weighed in the same way as you would any other witness.

15. WHAT IF A WITNESS PURPOSELY GIVES FALSE TESTIMONY?

If you believe a witness has purposely given false testimony about anything relevant to the case, you may disregard not only the false testimony but any of the remaining testimony from that witness, or you may give the remaining testimony whatever weight you think it deserves.

Instruction No. 16: The Charges

As noted above, the Defendant, Susan L. Tripp, is charged with the following crimes:

Count I: On or about April 23, 2004, at 10200 South U-111 Highway, in Salt Lake County, in violation of Utah Code Section 76-5-207(1), Defendant Susan L. Tripp, was driving a vehicle while (1) having sufficient alcohol in her body that a subsequent chemical test showed that she had a blood alcohol concentration of .08 grams or greater at the time of the test; or (2) while under the influence of alcohol or any drug or the combined influence of alcohol and any drug to the degree which rendered the defendant incapable of safely operating a motor vehicle; or (3) had a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control; and caused the death of a man named Daniel Pracht, by operating the vehicle in a negligent manner.

And

Count II: On or about April 23, 2004, at 10200 South U-111 Highway, in Salt Lake County, in violation of Utah Code Section 41-6-72.10(2), Defendant Susan L. Tripp did operate a motor vehicle and having stopped as provided by law, failed to yield the right-of-way to a vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time the operator was moving across or within the intersection or junction of roadways.

The Defendant has denied wrong-doing and has entered a plea of "Not Guilty" to both of these alleged offenses. Defendant's plea of "Not Guilty" puts in issue every material element constituting each of the above alleged offenses. The plea of "Not Guilty" places upon the State the burden of proving every element or essential allegation contained in the charges beyond a reasonable doubt.

17. WHAT TO TAKE WITH YOU INTO THE JURY ROOM

You may take the following things with you when you go into the jury room to discuss this case:

a. All exhibits admitted in evidence;

b. Your notes (if any);

c. Your copy of these instructions; and

d. The verdict form or forms that will be given to you.

18. WHAT TO DO IN THE JURY ROOM

The first thing you should do in the jury room is choose a person to be in charge. This person is called the FOREPERSON. The Foreperson's duties are:

a. To keep order and allow everyone a chance to speak;

b. To represent the jury in any communications you make; and

c. To sign your verdict and bring it back to court.

In deciding what the verdict should be, all jurors are equal. The Foreperson has no more power than any other juror.

19. YOUR VERDICT MUST BE YOUR OWN DECISION ARRIVED AT AFTER OPEN AND HONEST DELIBERATION.

Consider each other's opinions, then reach your own decision based upon honest deliberation. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of opinion or to announce a determination to stand for a certain verdict. When that is done at the outset, a person's sense of pride may block appropriate consideration of the case. Use your common memory, your common understanding and your common sense. Talk about the case with each other as you ponder and deliberate.

In the end, your verdict must be your own. Don't make a decision just to agree with everyone else. You should, however, respect and consider the opinions of the other jurors. If you are persuaded that a decision you initially made was wrong, don't hesitate to change your mind. Help each other arrive at the truth. Your decision must be unanimous. In an attempt to reach a decision, you may not resort to chance or any form of decision-making other than honest deliberation.

20. WHAT TO DO IF YOU HAVE QUESTIONS DURING DELIBERATION

If you think you need more information or a clarification, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question whenever appropriate. However, these instructions should contain all the information you need to reach a verdict based upon the evidence that has been presented to you. You should understand that no further evidence can be provided to you.

21. FOCUS ON THIS CASE ALONE

Your duty is to decide this case and this case alone. You should not use this case as a forum for correcting perceived wrongs in other cases or in the broader society, or as a means of expressing views about anything other than the guilt or innocence of this defendant. Your verdict should reflect the law given to you in these instructions applied to the facts that you find to be supported by the evidence. Your decision should not be distorted by any outside factors or objectives.

The final test of the quality of your service will be the verdict you return. You will make an important contribution to justice and your community if you focus exclusively on this case and return a just and proper verdict.

22. REACHING A VERDICT

Each count should be considered separately. You may find the defendant guilty of both counts alleged in the criminal Information, or you may find her not guilty of all counts alleged in the criminal Information, or you may find her guilty of one, but not all of the counts alleged in the criminal Information. The fact that a defendant may be guilty of one count is no evidence that she is guilty of any other count.

The matter of the appropriate punishment, if any, is a matter solely reserved to the Court. Your duty as jurors is only to judge the facts and apply the law as given to you by me in these instructions to determine the guilt or innocence of the defendant of the offense(s) charged in the criminal Information. You should not consider in any way the possible penalty involved in reaching your verdict.

In determining any fact in this case you should not consider nor be influenced by any statement made or act done by the Court which you may interpret as indicating its views thereon. You are the sole and final judges of all questions of fact submitted to you, and you must determine such questions for yourselves from the evidence, without regard to what you believe the Court thinks thereon. The Court has not intended to express, or intimate, or be understood as giving any opinion on what the proof shows or does not show, or what are or what are not the facts in the case. Indeed, it is immaterial what the Court thinks about it. You must follow your own views and not be influenced by the views of the Court.

As I have said, this being a criminal case, your verdict must be unanimous; all jurors must agree. When you are all in agreement, then you have reached a verdict and your work is finished.

23. HOW TO REPORT YOUR VERDICT

When you retire to deliberate, you will be provided with a Verdict Form, which is self-explanatory. After your deliberations have been completed and you have reached a unanimous verdict, the Foreperson should fill out and sign the Verdict form in accordance with the unanimous decision of the jury.

Once the Verdict form is signed, notify the bailiff that you are ready to return to court. The Foreperson should present the Verdict Form to the bailiff, at the direction of the judge, when you return to the courtroom to deliver your verdict.

24. WHAT HAPPENS AFTER THE VERDICT HAS BEEN REPORTED

After you have given your verdict to the judge, the prosecution and the defense will be asked to stand, and he will direct the clerk to read the jury's verdict. After that, the judge or the clerk may ask each of you about the verdict to make sure you agree with it. Then you will be released from your jury service and you may leave at any time.

After you are excused, you may talk about the case with anyone. Likewise, you are not required to talk about it, if you don't want to. If anyone attempts to talk to you about the case when you don't want to do that, please tell the Bailiff or the Court Clerk. Finally, if you do decide to discuss the case with anyone, keep in mind that your fellow jurors freely stated their opinions in the jury room with the understanding that they were speaking in confidence. Please respect the privacy of the views of your fellow jurors.

25. The Instructions are to be considered as a whole.

These instructions, though numbered separately, are to be considered and construed by you as one connected whole: Each instruction should be read and understood in reference to and as a part of the entire charge, and not as though any one sentence or instruction separately were intended to state the whole law of the case upon any particular point. Moreover, the order in which the instructions are given has no significance as to their relative importance.

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

26. The Verdict Form.

Concerning Count I, your verdict in this case must be either:

1. Guilty of automobile homicide
(or)

Not Guilty of automobile homicide

And, Concerning Count II, your verdict in this case must be either:

2. Guilty of failure to yield the right-of-way
(or)

Not Guilty of failure to yield the right-of-way,

as your deliberations may determine.

This being a criminal case, a unanimous concurrence of all jurors is required to find a verdict. Your verdict must be in writing, and when found, must be signed and dated by your foreperson and then returned by you to this court. A form for the verdict will provided for the Jury. The Foreperson should sign and date this form, filling in any appropriate blanks. When your verdict has been found and the form completed, notify the bailiff that you are ready to report to the court.

INSTRUCTION NO. 27: Elements of Automobile Homicide

Before you can convict the defendant, Susan Tripp, of the offense of Automobile Homicide, as charged in Count I of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 23rd day of April, 2004, in Salt Lake County, State of Utah, the defendant, Susan Tripp,
2. While operating a motor vehicle in a negligent manner,
3. Caused the death of Daniel Pracht; and
4. (a) had sufficient alcohol in her body that a subsequent chemical test showed that she had a blood or breath alcohol concentration of .08 grams or greater at the time of the test; or
   (b) was under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that rendered her incapable of safely operating a vehicle; or
   (c) had a blood or breath alcohol concentration of .08 grams or greater at the time of operation.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Automobile Homicide. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty.

28. "Negligent Manner" and "Cause" Defined

"Negligent manner" means that the Defendant Susan L. Tripp failed to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.

We all have a duty to use reasonable care to avoid injuring others. Reasonable care is simply what a reasonably careful person would do in a similar situation.

A person may be negligent in acting or in failing to act. The amount of care that is reasonable depends upon the situation. Ordinary circumstances do not require extraordinary caution. But some situations require more care because a reasonably careful person would understand that more danger is involved.

In this context, you are also instructed that "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that:

(1) the Defendant Susan L. Tripp's act or failure to act produced the death of Mr. Pracht directly, or set in motion events that produced his death in a natural and continuous sequence;

and

(2) the Defendant Susan L. Tripp's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

In addition, you are also instructed that there may be more than one cause of the same harm.

INSTRUCTION NO. 29: Sole Proximate Cause Not Necessary

The State is not required to prove beyond a reasonable doubt that the defendant's negligence was the sole proximate cause of death. When a defendant negligently creates a risk of death to another person, the fact that the person actually died as a result of the combination of that negligence plus some other contributing factor does not relieve the defendant of criminal culpability.

INSTRUCTION NO. 30: Victim's Negligence

A victim's negligence, if it exists, can be considered to be a concurrent cause and not a superseding one. Therefore, even if a victim were negligent, such a fact would not insulate the defendant from criminal culpability.

INSTRUCTION NO. 31: Driver's Duty of Care

The law imposes upon the driver of any vehicle using a public highway the duty to exercise ordinary and reasonable care to avoid causing an accident from which injury might result. This duty requires a driver to be vigilant at all times, keeping a lookout for traffic, traffic signals and other conditions reasonably to be anticipated; and to keep the vehicle under such control that the driver can stop as quickly as might be required of the driver in situations that would be anticipated by an ordinary, prudent driver in like position in order to avoid a collision.

INSTRUCTION NO. 32: Seeing Objects

General human experience supports the inference that when one in possession of his or her faculties looks in the direction of an object clearly visible, he or she sees it. When there is evidence to the effect that one did look but did not see that which was in plain sight, in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence, or the person was negligently inattentive.

The driver of a motor vehicle is charged with the duty of seeing those objects or persons which he or she would have seen had he been exercising reasonable care.

INSTRUCTION NO. 33: Creating a Dangerous Condition

Where a party by his or her wrongful conduct creates a condition of danger or peril, his or her action can properly be found to be a proximate cause of a resulting injury, even though later events which combined to cause the injury may also be classified as negligent, so long as the later act is something which can reasonablly be expected to follow in the natural sequence of events.

INSTRUCTION NO. 34: Indirectly Causing Death

It is not required that the defendant's actions be the direct cause of the victim's death. It is sufficient that they cause death indirectly through a chain of natural effects and causes unchanged by human action. The fact that other causes contribute to the death does not relieve the actor of responsibility, provided such other causes are not the sole proximate cause of the death.

INSTRUCTION NO. 35: Inflicting Injury and Causing Death

One who inflicts an injury on another is deemed by the law to have caused the death of another if the injury contributes immediately or mediately to the death of such other.

INSTRUCTION NO. 36: Definition of "Motor Vehicle"

"Motor vehicle" means any self-propelled vehicle and includes any automobile, truck, van, motorcycle, train, engine, watercraft or aircraft.

INSTRUCTION NO. 37: Definition of "Driving"

"Driving" is the every-day definition as you may understand it. It means "to urge forward under guidance, compel to go in a particular direction or direct the course of."

INSTRUCTION NO. 38: Blood Alcohol Tests

When an officer requests the defendant to submit to a chemical test to determine the person's blood or breath alcohol level, the defendant does not have the right to select a test different from the one requested by the officer, and it is not a defense in a criminal proceeding that a peace officer failed to arrange for a specific test requested by the defendant.

INSTRUCTION NO. 39: Accuracy of Chemical Test

In admitting evidence of a chemical analysis of the defendant's blood, the Court does not determine the accuracy of the test or analysis. Such is a question of fact for the jury alone to determine.

INSTRUCTION NO. 40: Definition of "Under the Influence"

"Under the influence of alcohol," as that expression is used here, covers not only the condition of various degrees of intoxication, but also covers any mental or physical condition which renders a person incapable of safely driving a motor vehicle as a result of ingesting alcohol.

The State is not required to prove that the defendant was drunk or intoxicated, as those terms are commonly understood. The State is only required to prove that while driving or in actual physical control of a motor vehicle in Salt Lake County, the defendant had a blood alcohol level of .08 grams or greater as shown by a chemical test taken after the alleged operation or physical control of a vehicle.

INSTRUCTION NO. 41: Yielding the Right-of-Way

Except when directed to proceed by a peace officer, every operator of a motor vehicle approaching a stop sign shall stop at a clearly marked stop line and shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when the operator is moving across or within the intersection or junction of roadways.

INSTRUCTION NO. 42: Elements of Failure to Yield Right-of-Way

Before you can convict the defendant, Susan Tripp, of the offense of Failure to Yield the Right of Way, as charged in Count II of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 23rd day of April, 2004, in Salt Lake County, State of Utah;

2. The defendant, Susan Tripp, as a party to the offense, was the operator of a motor vehicle approaching a stop sign; and

3. That the defendant, after stopping at the stop sign, failed to yield the right-of-way to any vehicle in the intersection or approaching on another roadway.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Failure to Yield Right of Way. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty.

INSTRUCTION NO. 43: View of the Scene

You have had the opportunity to view a portion of Highway U-111, including the intersection where the collision occurred.

You must keep in mind that your view of these areas occurred more than two years after the collision and that there may have been changes along the Highway or at the intersection. You should disregard any changes that may have occurred.

CONTROLLING CONSTITUTIONAL PROVISIONS AND RULES

Constitution of Utah, Article I § 7

No person shall be deprived of life, liberty or property, without due process of law.

Constitution of Utah, Article I § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Constitution of Utah, Article I §14

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah Code Ann. § 41-6-71.10 (2004)

(1) Preferential right-of-way may be indicated by stop signs or yield signs under Section 41-6-99.
(2)(a) Except when directed to proceed by a peace officer, every operator of a vehicle approaching a stop sign shall stop:
(i) at a clearly marked stop line, but if none,
(ii) before entering the crosswalk on the near side of the intersection, but if none, then there is not a clearly marked stop line; or
(iii) at a point nearest the intersecting roadway where the operator has a view of approaching traffic on the intersecting roadway before entering it if there is not a clearly marked stop line or a crosswalk.
(b) After having stopped at a stop sign, the operator of a vehicle shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when the operator is moving across or within the intersection or junction of roadways.
(c) The operator of a vehicle approaching a stop sign shall yield the right-of-way to pedestrians within an adjacent crosswalk.
(3)(a) The operator of a vehicle approaching a yield sign shall:
(i) slow down to a speed reasonable for the existing conditions; and
(ii) if required for safety, shall stop as provided under Subsection (2).
(b)(i) After slowing or stopping at a yield sign, the operator of a vehicle shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time the operator is moving across or within the intersection or junction of roadways.
(ii) The operator of a vehicle approaching a yield sign shall yield to pedestrians within an adjacent crosswalk.
(4)(a) A collision is prima facie evidence of an operator's failure to yield the right-of-way after passing a yield sign without stopping if the operator is involved in a collision:
(i) with a vehicle in the intersection or junction of roadways; or
(ii) with a pedestrian at an adjacent crosswalk after passing a yield sign without stopping, the collision is prima facie evidence of the operator's failure to yield the right of way but
(b) A collision under Subsection (4)(a) is not considered negligence per se in determining liability for the accident.

Utah Code Ann. § 76-5-207(2003)

(1) As used in this section, "motor vehicle" means any self-propelled vehicle and includes

any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.
(2)(a) Criminal homicide is automobile homicide, a third degree felony, if the person operates a motor vehicle in a negligent manner causing the death of another and:
(i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or
(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation.
(b) A conviction for a violation of this Subsection (2) is a second degree felony if it is subsequent to a conviction as defined in Subsection 41-6- 44(1)~~(a)~~.
(c) As used in this Subsection (2), "negligent" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.
(3)(a) Criminal homicide is automobile homicide, a second degree felony, if the person operates a motor vehicle in a criminally negligent manner causing the death of another and:
(i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or
(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation.
(b) As used in this Subsection (3), "criminally negligent" means criminal negligence as defined by Subsection 76-2-103(4).
(4) The standards for chemical breath analysis as provided by Section 41-6- 44.3 and the provisions for the admissibility of chemical test results as provided by Section 41-6-44.5 apply to determination and proof of blood alcohol content under this section.
(5) Calculations of blood or breath alcohol concentration under this section shall be made in accordance with Subsection 41-6-44(2).
(6) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense.
(7) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

Utah Code Ann. § 77-1-6

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.